No. 9401

In the United States Circuit Court of Appeals

For the Ninth Circuit.

P. M. JACKSON, Trustee in Bankruptcy for the Estate of Leonard J. Woodruff, a bankrupt,

Appellant,

vs.

E. A. LYNCH, Receiver in Bankruptcy of the Estate of Leonard J. Woodruff, Alleged Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

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Statement of Jurisdiction.

The United States District Court for the Southern District of California claimed and asserted jurisdiction over the parties and the subject matter by reason of an involuntary petition in bankruptcy filed by one creditor against Leonard J. Woodruff [R. 3 to 7]. See Title 11, Chapter 2, Sec. 11, United States Code Annotated.

This court has jurisdiction by reason of section 24, subdivision (a) of the Bankruptcy Act, Title 11, Sec. 47, United States Code Annotated, p. 360.

Statement of the Case.

Leonard J. Woodruff was adjudicated a bankrupt on his voluntary petition therefor by the United States District Court for the Eastern District of Oklahoma on July 5, 1939, and P. M. Jackson was thereafter appointed and qualified as trustee in bankruptcy for the estate, [R. 51, 67].

On July 13, 1939, an involuntary petition seeking the adjudication of Leonard J. Woodruff as a bankrupt was filed with the United States District Court for the Southern District of California [R. 3 to 7] and E. A. Lynch was appointed receiver by the California District Court on application by a single petitioning creditor, without notice to the bankrupt or trustee or the Oklahoma court [R. 12].

The petitioning creditor had actual knowledge at the time he filed the involuntary petition that Woodruff had been previously adjudicated a bankrupt in Oklahoma [R. 67].

Woodruff filed an answer to the involuntary petition [R. 15 to 20].

The bankrupt and certain creditors moved the District Court in Oklahoma for an order under General Order No. 6 and after due notice was given to all interested parties a hearing was had on October 16, 1939 in Oklahoma, and an order was entered decreeing that the United States District Court for the Eastern District of Oklahoma was the court which could proceed with the greatest conveni-

ence to the parties interested, and further ordering the transfer of the proceedings in Southern California to Oklahoma, and ordering the trustee to take charge of the bankrupt's property wherever located, and that the possession of the trustee be exclusive [R. 40 to 42].

A copy of the order of the District Court of Oklahoma was sent to the clerk of the District Court in California and was received by him on October 18, 1939.

The District Court in California, without notice, on the 19th day of October, 1939, entered an order staying the transmittal of the records to Oklahoma, and ordering the receiver and his attorneys to file their accounts and petitions for fees [R. 43 to 46].

The trustee in bankruptcy then moved the California court to vacate the *ex parte* order entered on October 19, 1939, and the matter was heard, submitted and the District Judge wrote an opinion and order dated November 15, 1939 and entitled "Memorandum of Order" denying the motion [R. 51 to 55].

The Trustee has appealed from both the orders of October 19, 1939 and of November 15, 1939 [R. 56 and 60].

ARGUMENT.

The California District Court Exceeded Its Jurisdiction by the Ex Parte Order of October 19, 1939.

Upon the entry of an order of adjudication, title to all property of the bankrupt wherever situated vests in the trustee in bankruptcy as of that date, and the jurisdiction of the bankruptcy court making the adjudication was exclusive, and could not be affected by proceedings in any other court, state or federal.

Gross v. Irving Trust Co., 289 U. S. 342;

Isaacs v. Hobbs, 282 U. S. 734;

Gratiot County State Bank v. Johnson, 249 U. S. 246;

Meyer v. International Trust Company, 263 U. S. 64.

A case particularly in point is *In re Southern States Finance Co.,* 19 Fed. (2d) 959. An order of adjudication had been entered in Delaware. Later an involuntary was filed in North Carolina and a motion was made to transfer to North Carolina. The court stated the rule as follows:

> "But in the case at bar it is not necessary to go so far, for here the second petition was not filed until after the adjudication and qualification of the trustee. By the adjudication here made the status of the corporation as a bankrupt was fixed and established. Gratiot State Bank v. Johnson, 249 U. S. 246, 39 S. Ct., 263, 63 L. Ed. 587; Myers v. Trust Co., 263 U. S. 64, 73; 44 S. Ct. 86, 68 L. Ed. 165. That status could not be affected, either by the dismissal of the petition filed in North Carolina or by there carrying the proceedings to an adjudication. Moreover, the

title of the bankrupt to its nonexempt property passed from the bankrupt to the trustee here chosen upon his appointment and qualification (Bankruptcy Act, Sec. 70 (Comp. St. Sec. 9654), thus leaving no property, save that after-acquired, of which there is no suggestion, upon or with respect to which the court in North Carolina could exercise original jurisdiction. Nor is it shown that there are creditors of the bankrupt whose debts have arisen subsequent to the filing of the petition in this district. See Stolzenbach v. Penn-American Gas Coal Co., *supra*.

Since the court in North Carolina was without power by its decree to affect the status of the corporation, or to bring effectively within its grasp the property which had passed by operation of law from the corporation to the trustee in bankruptcy, here chosen and qualified before the petition was there filed, it would seem obvious that the power essential to the existence and exercise of original jurisdiction was wholly wanting. The power conferred by the statute to make an adjudication and to pass title to the trustee had been exercised, and by its exercise exhausted."

In the case of *In re Continental Coal Corp.*, 238 Fed. 113, the Sixth Circuit Court of Appeals passed on a dispute between the District Court for the Eastern District of Kentucky and the District Court for the Eastern District of Tennessee. There an involuntary petition in bankruptcy was filed in the Kentucky court and three days later a voluntary petition was filed in the Tennessee court. Both courts attempting to exercise jurisdiction, it became necessary to determine the nature and extent of the jurisdiction of the federal court in Kentucky. The opinion states:

"In Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, Mr. Chief Justice Fuller, speaking

for the Supreme Court said: '"It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction (Bank v. Sherman, 101 U. S. 403 (25 L. Ed. 866); and on adjudication, title to the bankrupt's property became vested in the trustee (sections 70, 21e) with actual or constructive possession, and placed in the custody of the bankruptcy court. . . .'"

"It is thus clear that the filing of the petition in bankruptcy in the District Court for the Eastern District of Kentucky, and the issuing of process thereon, was an assertion of the jurisdiction of the court over the bankrupt's estate, and gave that court prior jurisdiction over the subject-matter, which jurisdiction was exclusive during the pendency of such proceedings for adjudication. It may be true that the court below did not have actual possession, through its officers, of the property of the bankrupt estate, but it cannot be denied with reason that the court had such possession of the bankrupt estate, as placed it in *custodia legis* . . . Acme Harvester Co. v. Beckman Lumber Co., 222 U. S. 307, 32 Sup. Ct. 96, 56 L. Ed., 208."

"The title of the trustee in bankruptcy, appointed under the involuntary proceedings so first begun would be fixed as of the time of the filing of the petition. (Citing cases.) . . ."

"If this were a case of concurrent jurisdiction on the part of the federal courts in Kentucky and Tennessee, then the question would be disposed of under section 32 of the Bankruptcy Act and General Order No. 6 (89 Fed. V, 32 C. C. A. IX), or if the courts had concurrent jurisdiction and section 32 and General Order No. 6 did not exist, then it would perhaps be held that the court first acquiring jurisdiction

would retain the case for the purpose of adjudging the defendant corporation a bankrupt, and settling and distributing its estate; but here one or the other of these courts has exclusive jurisdiction to entertain this case. The jurisdiction of the federal court in Kentucky first having been asserted on the filing of the involuntary petition, in the absence of any statute or general order in bankruptcy, we think both upon principle and authority, that the court in which jurisdiction was first asserted took constructive possession of the property of the bankrupt estate, and should retain the case for the purpose of determining the question of its own jurisdiction." (Citing several Supreme Court cases.)

The Supreme Court of the United States, in the leading case of *Isaac v. Hobbs, supra,* states the rule:

"Upon adjudication, title to the bankrupt's property vests in the trustee with actual or constructive possession and is placed in custody of the bankruptcy court. Mueller v. Nugent, 184 U. S. 1, 14. The title and right to possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits. (Citing cases.) It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate. . . . When this jurisdiction has attached the court's possession cannot be affected by actions brought in *other courts.* . . ."

"The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors." (Italics supplied.)

Again the rule is stated as follows:

> "Upon adjudication in bankruptcy, all property of the bankrupt vests in the trustee as of the date of filing the petition. Upon the filing, the jurisdiction of the bankruptcy court becomes paramount and exclusive; and thereafter the court's possession and control of the estate cannot be affected by proceedings in other courts, whether state or federal." Citing Gross v. Irving Trust Co., 289 U. S. 342, 22 Am. B. R. (N. S.) 661, 53 S. Ct. 605, 77 L. Ed., 1243, 90 A. L. R. 1215; Acme Harvester Co. v. Beekman Lum. Co., 222 U. S. 300, 27 Am. B. R. 262, 32 S. Ct., 96, 56 L. Ed., 208; In re Diamond's Estate (C. C. A., 6th Cir.) 44 Am. B. R. 268, 259 F. 70."
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> *Taylor v. Sternberg,* 27 Am. B. R. (N. S.) p. 1, 293 U. S. 470.

Under the above decisions, the jurisdiction of the District Court in Oklahoma was exclusive and the title to the bankrupt's property was exclusively in P. M. Jackson, as trustee, and the District Court of California had no jurisdiction to appoint a receiver or order the receiver or his attorneys' fees paid out of property then in *custodia legis.* To allow the California court to do so would be to permit the California court to create a lien and charge on the assets in *custodia legis* of the Oklahoma court after July 5, 1939. Likewise for the California court not to give full faith and credit to the judgment of adjudication of the Oklahoma court, besides violates a well recognized doctrine of comity that where two courts having concurrent jurisdiction the one first proceeding to judgment exhausted the jurisdiction of the other court.

No Ancillary Proceedings Were Instituted and the California Court Had No Jurisdiction to Appoint a Receiver or Hold Possession of the Assets.

An adjudication having been entered in Oklahoma prior to any proceedings in the California court, on the above cases cited the Oklahoma court had exclusive jurisdiction. Before ancillary proceedings could be instituted in California, General Order No. 51 would have had to be complied with. Said General Order provides:

> "No ancillary receiver shall be appointed *in any* District Court of the United States in any bankruptcy proceeding pending in any other district of the United States except (1) upon the application of the primary receiver, or (2) upon application of any party in interest *with the consent of the primary receiver*, or by leave of a judge of the court of original jurisdiction."

Then follows a statement of requirements of the petition.

Proceedings under General Order No. 51 were not instituted in this case, but a single creditor attempted to file an involuntary proceeding with actual knowledge of the previous adjudication in bankruptcy.

Where adjudication promptly follows the filing of the petition against a corporation in the district of its domicile, the jurisdiction of that court is exclusive over all proceedings in the matter. Using the language of *In re United Button Co.*, 12 A. B. R. 761, 132 Fed. 378:

> "However, it may be difficult to understand how a corporation or any other person once adjudged a bankrupt by a competent court, whatever the relative date of filing the petition, can again be decreed a bankrupt

by a court in a proceeding not ancillary. When a competent court has adjudged that judgment is final as to the bankrupt and his creditors, and another court cannot superimpose in an independent judgment in a separate proceeding; otherwise the judgment would not be an estoppel."

The Order of October 19, 1939, Violated General Order No. 6 and Section 32 of the Bankruptcy Act.

If this court differs with appellant that the California court had jurisdiction, then the orders appealed from violated section 32 of the Bankruptcy Act and General Order No. 6 promulgated by the Supreme Court. The Bankruptcy Act provides:

> "In the event petitions are filed by or against the same person or by or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall, by order of the court first acquiring jurisdiction, be transferred to and consolidated in the court which can proceed with the same for the greatest convenience of parties in interest."

General Order No. 6 provides:

> "If two or more petitions are filed by or against the same person or by or against different members of a partnership in different courts of bankruptcy, each of which has jurisdiction, the court first acquiring jurisdiction shall, upon application by any party in interest and after a hearing upon reasonable notice to parties in interest, determine the court in which the cases can proceed with the greatest convenience to parties in interest, and the proceedings upon the other petitions shall be stayed by the courts in which such

> petitions have been filed until such determination is made. If the court first acquiring jurisdiction determines that it shall hear the cases, it shall make its order to that effect, and other courts in which petitions have been filed, upon exhibition of a certified copy of such order, shall order the cases before them transferred to the court first acquiring jurisdiction. If the court first acquiring jurisdiction determines that the cases shall be heard by another court, it shall make its order to that effect and that the case before it be transferred to such court; and other courts in which petitions have been filed, upon exhibition of a certified copy of such order, shall order the cases before them transferred to the court named in the order of the court first acquiring jurisdiction."

A hearing was had in the District Court of Oklahoma after notice to all parties in interest and that court determined that all matters could proceed in Oklahoma with the greatest convenience to all parties in interest [R. 40 to 42] and further ordered that the proceeding in California be transferred and consolidated with the proceeding in Oklahoma [R. 42].

The District Court in California has prevented the clerk of its court from complying with General Order No. 6, and has tried to reserve unto itself the privilege of making future orders in respect to the administration and properties, as it is provided in the order [R. 45]:

> "IT IS HEREBY ORDERED that the Clerk of the District Court of the United States for the Southern District of California, Central Division, stay the transmittal of the records in this proceeding as the

> same exist in this jurisdiction until such time as this Court shall have made its further orders approving, or disapproving, the report and account filed by the Receiver as appointed by this Court, and shall have made the allowance to the Receiver and to his attorneys for compensation and for expenses, and shall have made an order with respect to the payment thereof; . . ."

To permit the practice indulged in by the California District Court would be to allow Jackson as trustee as owner of the bankrupt's property for which he is liable on his bond and which property was in *custodia legis* to be taken by another court with knowledge of these rights, held by another court through its receiver, charge the property with a lien for administration cost in flagrant disregard of the true owner's rights. We submit this is not the law and it was the intention of the Supreme Court in promulgating General Order No. 51, to not permit another court to appoint ancillary receiver without the consent of the court of original jurisdiction or on petition of the primary receiver. The practice here indulged in would make General Order No. 51 meaningless.

In the instance of a conflict between the state court of Missouri and a District Court of the United States, the question of jurisdiction in a bankruptcy arose over the disputed possession of property. The petitioning trustee in the Federal Court sought and obtained an order for possession of the property.

The opinion states the situation as to any asserted claims for services or care and custody of the property while under the assumed jurisdiction of the state court:

> "As the circuit court of Clark county had no jurisdiction over the property in the possession of its receiver, it had no authority to dispose of any portion of such property or its proceeds. If any expenses have been incurred, or any services rendered in the care and preservation of the property, they will, no doubt, be allowed by the United States District Court for the Southern District of Iowa, which court alone has jurisdiction to impose charges upon this property.
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> *In re Sage,* 224 Fed. 525, *State of Missouri v. Angle* (affirmed in 236 Fed. p. 644).

See also:

> *State of Missouri v. Angle,* 236 Fed. 644,

wherein the following language appears upon the matter of a court, acting in excess of its jurisdiction, attempting to compensate its appointee for services. At page 653 the court said:

> "As the state court was without authority to administer any portion of the assets of David H. Sage, it must be without power to award compensation to its officer for performing part of that labor. So far as those services were of value to the estate, in preserving and collecting it, an application to the court of bankruptcy will afford an avenue of relief. Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed., 1165."

See also, on the same point, the late United States Supreme Court decision in *Taylor v. Sternberg, supra.*

No Reason Has Been Shown Why the Oklahoma Court Cannot Proceed With All Future Matters.

The Oklahoma court has determined that it can proceed with the greatest convenience to all parties in the future, and we see no reason why, after consolidation, all proceedings should not be had in one court instead of continuing the interference by the District Court of California with the trustee's ownership and rights. To show where this would lead: the California court would order a sale of Jackson's property to pay allowances made by it after title and possession was vested in the trustee. This is in violation of the Bankruptcy Act in spirit as well as letter. (See Section 32.)

It is urged that the relief herein sought is fully justified upon lawful, practical and fair considerations of the substantial rights of all creditors of the estate and of the bankrupt, in order to further the equitable objectives of the administration of the bankruptcy estate.

Furthermore, upon the grounds of comity, the orderly and economical administration of justice, as fixed by statute and declared by judicial decisions, this court should establish the lawful and exclusive jurisdiction of the United States District Court for the Eastern District of Oklahoma, so far as the matter in controversy is concerned, and set aside the orders appealed from.

Wherefore, it is respectfully submitted that, upon the authorities and law herein cited, the orders appealed from be set aside.

Respectfully submitted,

FRANCIS B. COBB,
Attorney for Appellant.